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No. 333

In the Supreme Court of the United States

OCTOBER TERM, 1948

AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727, AN UNINCORPORATED ASSOCIATION, PETITIONER

v.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, MALCOLM E. KIRK, AND LOCKHEED AIRCRAFT CORPORATION, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE RESPONDENTS JAMES L. CAMPBELL, MITCHELL B. JOPLIN, AND MALCOLM E. KIRK

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OPINIONS BELOW

The oral opinion of the District Court for the Southern District of California (R. 117-120) is not officially reported. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 132) is reported at 169 F. 2d 252.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July

26, 1948 (R. 136). The petition for a writ of certiorari was filed on October 1, 1948, and was granted on November 22, 1948 (R. 138). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a collective bargaining agreement, entered into during a World War II veteran's absence in military service, may reduce the seniority ranking which he held at the time of his induction by conferring absolute retention rights on union officials with lesser seniority, where, as a result of such reduced seniority ranking, he is laid off from work during the first year of his reemployment and union officials with less seniority are retained.

STATUTE INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, are set out in the Appendix, pp. 47-49.

STATEMENT

Respondent Campbell entered the employ of respondent Lockheed Aircraft Corporation (Lockheed) on August 17, 1942, was inducted into the Army of the United States on February 26, 1944, and, after being honorably discharged on October 28, 1945, was reemployed by Lockheed on November 27, 1945 (R. 9-10, 98). Respondent Joplin was employed by Lockheed on April 19, 1943, entered the Army on June 4, 1945, was honorably discharged on November 23, 1945, and was reem-

ployed on December 10, 1945 (R. 10, 99). Respondent Kirk was employed by Lockheed on August 5, 1942, was inducted into the Army on June 2, 1944, was honorably discharged on January 12, 1946, and was reemployed on March 7, 1946 (R. 10, 99-100).

At the time of the induction of each of the three into military service, a collective bargaining agreement was in effect between Lockheed, their employer, and petitioner, Aeronautical Industrial District Lodge 727 (the Union), their collective bargaining agent (R. 4, 100). The seniority provisions of that agreement, which had been in effect since September 15, 1941, provided for layoffs based on length of service in the plant (R. 4, 23).[1] The 1941 agreement also provided for a "department chairman for approximately every 35 to 50 employees and a senior chairman for each department" for each shift of work (R. 19). The 1941

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[1] Art. III, sec. 5 of the 1941 agreement provided (R. 23-24): "In case of a slack in production, layoffs are to be made primarily on the basis of the principle of seniority. Due consideration will be given, however, to (a) knowledge, training, ability, skill and efficiency, and (b) deportment record and other factors. If it becomes necessary to reduce the working force in any plant or department, a plan of layoff procedure will be prepared by the management and submitted to the Union for approval. If such plan is not acceptable to the Union the Company agrees to enter negotiations with the Union and to attempt to arrive at a mutually agreeable plan. If, however, at the end of one working week from the date the Company submitted its original plan of layoff procedure to the Union no new plan has been mutually agreed to, the Company may proceed according to its proposed plan of layoff subject to Article II, Section 6."

agreement contained no provision for preference in retention of union chairmen in the event of layoffs.

On June 4, 1945, while the three respondent employees were in military service, a new collective bargaining agreement was made. (R. 5, 103). Under this new agreement, the seniority provisions of the 1941 agreement were changed so as to give union chairmen super-seniority regardless of length of service in the plant (R. 61, 105).[2] Apart from this modification, the sequence of layoffs necessitated by reductions in force was not altered (Art. IV, sec. 3(A) and (B), R. 60, 104).

The 1945 agreement was in effect at the time the three respondent employees were reemployed by Lockheed. They were and had been members of the union (R. 97-98). Thereafter, but within one year of their reemployment, they were laid off

[2] Art. IV, sec. 3(D), of the 1945 agreement provided (R. 61): "Top seniority for union chairmen for purpose of layoffs. For the purpose of applying the temporary and general layoff procedures, union chairmen who have acquired seniority shall be deemed to have top seniority so long as they remain chairmen. If the application of the general layoff procedure will result in the retention of more of such chairmen in a group or department than are provided for in Article II, Section 2 of this agreement, the Company shall prepare and furnish to the Union a list of all chairmen in the locations where the surplus exists. The Union shall upon request of the Company promptly designate the chairmen who are to remain in that capacity and the chairmen not to be retained as chairmen shall be governed by the seniority rules applicable to the layoff of other employees. During a temporary layoff and during the period between the first and second steps in an emergency reduction of the working force, the terms of office of laid-off union chairmen shall be deemed to continue."

pursuant to the terms of the new collective bargaining agreement while union chairmen in the same occupation group and with shorter periods of service with Lockheed were retained in their jobs (R. 90, 93). The stipulation of facts refers to but a single union chairman as having been retained in preference to the respondent employees (R. 106). However, the answers of both Lockheed and the Union admit that Lockheed retained in its active employ "certain Union chairmen with less seniority, i. e., 'length of service with the Company,' than 'petitioners'" (R. 89, 93). The ability, skill and efficiency of the respondent employees, during the period of their layoff, was "substantially equal" to that of the union chairmen who were retained (R. 90, 93). The three respondent employees protested their layoff and were restored to active employment within a month (R. 107). Had they not been laid off they would have received as pay from Lockheed for the period of their layoff, the following sums: Campbell, $168.00; Joplin, $124.56; and Kirk, $190.00 (R. 107).

Respondent employees brought suit, in the District Court on November 27, 1946, against Lockheed (R. 2, 88).[3] Their "Petition for Enforcement of Veterans' Reemployment Rights" prayed for judgment for the compensation lost during the lay-

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[3] Respondents were represented by the United States Attorney under Section 8(c) of the Selective Training and Service Act of 1940.

off period as a result of "respondent's unlawful action in failing and refusing to reemploy them without loss of seniority, and in laying them off while retaining in active employment group and senior chairmen with less company-wide seniority * * *" (R. 2, 10). Lockheed answered admitting the layoffs and the retention of union chairmen with lesser seniority in accordance with the 1945 agreement, but prayed for a judgment in its behalf (R. 89, 90-91). Petitioner Union was permitted to intervene. It filed an answer, admitting the layoffs, the retention in the same occupation group in which the veterans were employed of union chairmen with lesser seniority, and the fact that the ability, skill and efficiency of each of the three veterans was substantially equal to that of any of the retained union chairmen (R. 93). The union's answer, in addition, alleged as a separate defense that respondent employees were members of the union and bound by the provisions of the 1945 agreement, and prayed for a denial of the relief sought in the petition (R. 95-96).

The District Court tried the cause on the pleadings and a stipulation of facts. The court adopted the stipulation as its own findings of fact (R. 97-107, 111). It decided that the three employees were entitled to the wages they lost during their layoff and that the provision of the 1945 collective bargaining agreement giving top seniority to union chairmen was inapplicable to, and not binding upon,

the three employees "during their statutory year of reemployment" (R. 111-112). In an oral opinion, the District Court pointed out that its decision in favor of the veteran employees did not confer on them a "step-up or gain in priority * * * [they] merely step back upon the same step of the seniority escalator * * * [from which they] stepped off to enter the military service. The union chairman either was on a lower step or took his position on the escalator while the veteran was absent. No agreement between employer and union made in the veteran's absence could give the chairman a place above him in seniority." (R. 119-120).

The Court of Appeals for the Ninth Circuit affirmed on the basis of *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, and *Trailmobile Co.* v. *Whirls*, 331 U. S. 40. The court also expressed its agreement with the dissenting, rather than majority opinions, in four Third Circuit cases involving the same issue; *Gauweiler* v. *Elastic Stop Nut Corp.*, 162 F. 2d 448; *Koury* v. *Elastic Stop Nut Corp.*, 162 F. 2d 544; *DiMaggio* v. *Elastic Stop Nut Corp.*, 162 F. 2d 546; and *Payne* v. *Wright Aeronautical Corp.*, 162 F. 2d 549. Judgment of affirmance was entered on July 26, 1948 (R. 136).

SUMMARY OF ARGUMENT

Respondent veterans, during the first year of their reemployment, were laid off from work pursuant to the provisions of a collective bargaining agreement entered into during the period of their

service in the armed forces. That agreement changed the preexisting one by granting super-seniority to certain union officials, who had less seniority under the preexisting agreement than respondent veterans. The basic right here asserted by respondent veterans is that of restoration to employment for one year at their pre-induction jobs with at least the same seniority they had before their induction. This right is not predicated on any claim of "super-seniority" over non-veterans during layoffs. It rests on the veteran's right under the Selective Service and Training Act of 1940 to his pre-service seniority and to a full year's reemployment in accordance with that seniority. That Act was an expression of congressional desire that a returning veteran be assured of a full year's reemployment in which to rehabilitate himself economically, a purpose fully recognized by this Court. Section 8 of the Act extended that protection to veterans returning to both private and federal employ. The right may be limited, in private employment, by the normal operation of the seniority system in effect at the time of the veteran's induction. It may not, however, as the court below properly held, be impaired by seniority systems established by an employer and a union during the veteran's absence in military service.

I. A. The legislative history of the Act discloses that this view accords with the congressional intent. Congressional consideration of the per-

tinent bills in committee and on the floor shows a special and consistent intent to restore the veteran to his full pre-service seniority.

B. The language of the Act fully reflects the congressional intent. Section 8(b) requires that the veteran be "restore [*d*]" to his pre-service position "or to a position of like seniority, status, and pay." Section 8(c) repeats the congressional mandate that the veteran "shall be restored without loss of seniority," and prohibits his discharge "without cause within one year after such restoration." If Congress had intended the result here urged by petitioner (*i.e.*, restoration to whatever seniority is available under the collective bargaining agreement in effect at the time of the veteran's reemployment), it would not have required restoration "without loss of seniority."

C. This Court's rulings in *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, and *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, fully support this position. Those cases hold that Section 8 secures to a veteran his full pre-service seniority rank during his first reemployment year. They also hold that an impairment of a veteran's pre-service seniority standing during that first year constitutes a demotion to an inferior position and consequently a "discharge" in violation of Section 8(c). Where, as here, the 1945 agreement not only "demoted" veterans by reducing their numerical ranking on the seniority

roster, but also forced them out of work with a resulting loss of wages, even greater reason exists for invoking the protection afforded veterans by Section 8.

II. A. The veteran's right to pre-service seniority is protected by statute. It may not, therefore, be impaired by a later collective bargaining agreement between an employer and a union. It is immaterial that the pre-service seniority here involved was acquired under a collective bargaining agreement. In the absence of such an agreement and the general seniority system created under it, the veteran, in private industry, has the same absolute right to the full year's employment as is available to veterans restored to federal employ. In addition, there can be no doubt that Section 8 requires a restoration to at least the seniority accrued prior to the veteran's military service. Since the 1945 agreement here involved conflicts with statutory protection granted by Section 8, the agreement obviously must yield.

B. Contrary to petitioner's contention, Section 8 does more than prevent discrimination against the returing veteran because of his military service. Section 8, in many of its clauses, extends to reemployed veterans protection which they would not have had if they had remained at work. The legislative history of the reemployment provisions also shows that reading Section 8 to embody only a rule

against discrimination writes into it provisions which Congress specifically rejected. Moreover, the *Fishgold* and *Trailmobile* cases fully recognize that the purpose of Section 8 is not to be limited to preventing discrimination against the veteran.

Nor is there substance to the fear that failure to enforce the union chairmen super-seniority provision against veterans with greater seniority may disrupt harmonious labor relations. The merits of the system of "top" seniority for union officials are not in issue here. There would seem to be no reason why labor and management could not make such a system fully effective except in the very limited zone where it would cut down the protection given by Section 8 to the veteran during his first reemployment year.

ARGUMENT

The three respondent veterans, after completing their Army service, were restored by Lockheed to their positions as mechanics. Due to a subsequent lack of work in the plant, each of these veterans was laid off for about a month during their first year of reemployment, even though other mechanics who had shorter service with the plant but who held union chairmanships, were not laid off. These layoffs were effected in accordance with a 1945 collective bargaining agreement, entered into between Lockheed and the petitioner while the veterans were in the Army. That agreement required Lockheed to lay off senior employees before

junior employees holding union chairmanships. This requirement differed from the seniority provision in effect at the time of induction of respondent veterans into the Army. At that time, the collective bargaining agreement required that junior employees be laid off before senior employees and conferred no superior retention rights on union chairmen.

The application of the layoff provisions of the 1945 agreement to respondent veterans which resulted in Lockheed's refusal to give them work for a month during the statutory reemployment year, constituted a clear violation of the Selective Training and Service Act of 1940. The right of the veteran to continued employment during the slack period in this case is based not on any claim of "superseniority" over non-veterans during layoffs, but on the Act's preservation of his preservice seniority and its provision, in private industry, for a full year's reemployment in accordance with such seniority.

Congress, in September, 1940, enacted the Selective Training and Service Act to make possible the expansion of the Army and Navy and the training of the manpower of the nation to wage a winning war in the event that the United States should become involved in the war which had already commenced. It recognized that the employment status of men called upon to serve in the armed forces would be disrupted and that, after

the completion of the training period, many might have no civilian jobs to which to return. Section 8 of the Act was designed to lessen the subsequent economic impact upon the men thus inducted into the military service. It required the employer to rehire the returning veteran and gave the veteran the opportunity for economic rehabilitation by assuring him one year's employment from the time of restoration to his position (Section 8(b) and (c)). See *John S. Doane Co. v. Martin*, 164 F. 2d 537, 540 (C. A. 1). After the United States became involved in World War II, the Act applied in terms to all persons who were inducted into the armed services. Where the veteran had no job to return to, and it was impossible to assure him of a year's employment in which to regain his lost skills and reestablish himself accordingly, Congress, in later legislation, provided for unemployment compensation payments for the same one year period.[4]

Congressional concern for the veteran's right to his job for one year in those cases where he had a job to which to return, is fully recognized in the three decisions of this Court involving the reemployment provision of Section 8. *Hilton v. Sullivan*, 334 U. S. 323, held that Section 8 guarantees to a returning federal employee absolute retention preference during his first year of reemployment.

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[4] Serviceman's Readjustment Act of 1944, 58 Stat. 295; 38 U. S. C. 696(a).

Trailmobile Co. v. *Whirls*, 331 U. S. 40, recognized that the statutory reemployment right is effective against a private employer through, but not beyond, the first year of reemployment. And *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, held that while a veteran returning to private employ is entitled to a full year of reemployment, he may, pursuant to seniority provisions in a collective bargaining agreement in force at the time of his induction into the armed forces, be laid off during that first year. Thus, both in federal and private employment a veteran has an absolute right to a full year's employment, except where a pre-existing contract set up a seniority system the operation of which called for the retention of a non-veteran with greater seniority in the event of layoff. In the absence of such a pre-induction seniority system, there would seem to be no doubt of the veteran's right, in private employment, to the absolute retention preference for one year which this Court held to exist in favor of federal employees. See *Hilton* v. *Sullivan*, 334 U. S. 323, 332.

Section 8, then, provides for a year's actual employment for a veteran who returns to federal employment or to private employment. In private employment, however, that right is subject to seniority provisions in collective bargaining agreements effective at the time of the veteran's induc-

tion.[3] Here, operation of the seniority system in effect at the time of the veterans' inductions would have precluded their layoffs during their first year of reemployment. The chief issue in this case is whether Section 8's provision for a year's reemployment in private industry may be impaired by seniority provisions of a collective bargaining agreement entered into during the veteran's absence in military service. Petitioner urges that the veterans' reemployment rights can be so impaired even though his normal pre-service seniority entitles him to full employment for that year. We submit, on the contrary, that the Act protects the veteran's pre-service seniority and that such seniority may not be impaired within the year of assured reemployment by a subsequent collective bargaining agreement.

I

Section 8 of the Selective Training and Service Act of 1940 Guarantees the Veteran at Least His Pre-service Seniority During the First Year of His Reemployment

The legislative history of the Selective Training and Service Act of 1940, the plain language of Section 8 thereof, and the decisions of this Court interpreting the Act disclose that Congress provided that a veteran was to be restored to the position

[3] It is also subject to the further condition that reemployment by a private employer shall not be required where "the employer's circumstances have so changed as to make [such reemployment] impossible or unreasonable." That proviso, however, has no application to the instant case.

which he held at the time of his induction and that he was to be protected in that position against discharge, demotion or reduction in seniority for at least one year.

A. *The Legislative History*

The legislative history of Section 8 of the Selective Training and Service Act of 1940 discloses an abiding congressional intent to protect fully the veteran's pre-service seniority. In tracing the development of Section 8 of the Selective Training and Service Act, the legislative history of the National Guard Act is also pertinent, since both were simultaneously under consideration, and because it was deemed desirable to keep their reemployment provisions identical. Changes made in one were incorporated into the other without further debate.

As originally introduced in the 3d Session of the 76th Congress, neither S. J. Res. 286, which eventually became the National Guard Act, nor S. 4164 and H. R. 10132, which became the Selective Training and Service Act of 1940, contained any provisions for reemployment of returning veterans. Such provisions were first inserted by the Senate Committee on Military Affairs in its consideration of S. 4164, the first of the two measures to be proposed, and it is the successive Committee prints of S. 4164 which reveal the

solicitude of the legislators to safeguard a veteran's pre-service seniority.[6]

Thus, the first draft of the bill prepared by the Senate Military Affairs Committee declared it to be "the purpose and intent of the Congress that every man who is called from a job when inducted * * * ought to be reemployed in such job or an equally good one *without loss of seniority* * * *." Committee Print No. 1, July 23, 1940. (Emphasis supplied.) The absolute protection of pre-service seniority was again emphasized in the fourth committee draft of the reemployment provisions of the Act, which declared that it was "the purpose and intent of the Congress that every man who is called from a job * * * with a private employer * * * be reemployed in such job or a comparable one *without loss of seniority* or benefits or insurance participation and benefits * * *." Committee Print No. 4, July 27, 1940. (Emphasis supplied.) In the fifth committee draft, the first pertinent sentence of the reemployment provisions simply ordered the returning veteran restored to his former position "or to a position of like status and pay" (Section 8(b)). In order to spell out clearly the fact that the "like status" restoration requirement necessitated restoration to a position which guaranteed pre-service seniority rank, an

[6] Since "seniority is an extremely valuable right * * * it is easily understandable that Congress should be alert to safeguard veterans in this particular." *Huffman* v. *Norfolk & Western Ry. Co.*, 71 F. Supp. 564, 568 (W. D. Va.).

additional sentence was added to this fifth print. It provided that the veteran "shall be so restored without loss of seniority, insurance participation or benefits, or other benefits, and such person shall not be discharged from such position without cause within one year after such restoration." (Section 8(c)). Committee Print No. 5, July 31, 1940.

While these reemployment provisions were developing during the Senate Military Affairs Committee's consideration of S. 4164, they were first debated in Congress in connection with S. J. Res. 286 which, although introduced much later than S. 4164, was reported earlier. S. J. Res. 286 was introduced and reported on July 30, 1940 (86 Cong. Rec. 9684), with the addition of the reemployment provisions formulated by the Committee in connection with S. 4164. See S. Rep. No. 1987, 76th Cong., 3d sess. Here, too, since the first restoration provision referred only to "a position of like status and pay," an additional sentence was added to emphasize the intent to have "like status" include a specific guarantee against loss of pre-service seniority.[7]

The Senate passed the National Guard bill with-

[7] The additional sentence, which is identical with Section 8(c) originally enacted into the National Guard Act read as follows (54 Stat. 858, 860):

> Any person who is restored to a position in accordance with the provisions of paragraphs (A) or (B) of subsection (b) shall be so restored without loss of seniority, insurance participation or benefits, or other benefits, and such person shall not be discharged from such position without cause within one year after such restoration.

out any change in the Committee-recommended reinstatement provisions. 86 Cong. Rec. 10068. The House Committee on Military Affairs recommended the elimination of the additional sentence. However, since that elimination could have possibly raised a doubt as to whether "like status" included seniority, the House Committee carefully inserted the word "seniority" in the first sentence of the restoration provision. (H. Rep. No. 2847, 76th Cong., 3d sess.). The House accepted both amendments without debate. 86 Cong. Rec. 10439, 10448. In conference, the provision protecting seniority was still further strengthened. Not only did the conference committee restore the additional sentence specifically requiring restoration "without loss of seniority," but, in addition, adopted the House's insertion of "seniority" in the first sentence. (H. Rep. No. 2874, 76th Cong., 3d sess.). The chairman of the House Military Affairs Committee, in discussing the conference report, explained the additional references to seniority as follows (86 Cong. Rec. 10761):

> * * * You will find that in amendments number 12, 13, and 14 the House inserted the word "seniority" relating to a position held by the guardsman. It is inserted in three places, and provides that he shall be restored to his seniority status. In other words, if a man is a Civil Service employee in the Government of the United States and is called into service, he shall be restored on his return to the senior

> position he held before he left without losing that seniority position. Likewise, with a railroad employee, under a system of seniority rights on the railroad that gives the older men in the service priority over the others, that man when he returns shall be restored to his seniority position.

S. J. Res. 286 was passed by both Houses with these changes. 86 Cong. Rec. 10759-10763, 10791; National Guard Act, Joint Resolution of August 27, 1940, c. 689, 54 Stat. 858.

These repeated references to pre-service seniority restoration were not necessary to preserve that seniority. A single provision to that effect would have sufficed. Nevertheless, Congress deliberately utilized these references to seniority to dispel the very doubt which petitioner here seeks to engender.

Both reemployment provisions, with the deliberately repeated reference to seniority, were then carried over into the selective service bill (86 Cong. Rec. 10922-10923). The second sentence (which became Section 8(c) of the Act) was amended, as indicated by the italicized portion below, to clarify the fact that the benefits available to the returning veteran were to be no less than those he enjoyed at the time of his induction into the service. 86 Cong. Rec. 10914, 11702. It was changed to read as follows:

> Any person who is restored * * * shall be so restored without loss of seniority; *and shall*

be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time of being inducted into such forces, and shall not be discharged from such position without cause within 1 year after such restoration.[8]

In explaining this amendment, the chairman of the House Military Affairs Committee stated its chief purpose to be (86 Cong. Rec. 11702):

> * * * to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement.

Throughout the congressional consideration of both the National Guard and the selective service bills, the right of restoration to a job without loss

[8] This language was also added to the appropriate section of the National Guard Act, previously passed, so as to conform the two statutes. See Section 8(d) of the original Selective Training and Service Act, 54 Stat. at 891, amending Section 3(c) of the National Guard Act. The only difference then remaining reflected the different character of the military service involved. Section 8(c) of the Selective Training and Service Act referred to "the time such person was inducted into such forces," while Section 3(c) of the National Guard Act as amended spoke of "the time such person was ordered into such service."

of pre-service seniority; especially where such a loss would prejudice the veteran's rights to a full year's reemployment, was consistently recognized as an essential element of the reemployment provisions. The committee clarification of "status" to include seniority, the conference committee's insistence on repetitious references to seniority rights, which was carried over into the bills as enacted, and the explicit prohibition against discharge "within one year after such restoration," provide significant instances of this uniform attitude. Senate and House debates furnish additional instances of the same intention. Senator Sheppard, Chairman of the Senate Military Affairs Committee, described Section 8 as an attempt "to prevent loss of seniority, accrued employment benefits * * * and other beneficial programs," (86 Cong. Rec. 10095) and the identical provision in the National Guard Act as an effort to insure that returning veterans be restored "to their former employment at the end of their training or to employment of similar pay and status." He further explained that "Persons restored to * * * positions in private employment shall be so restored without loss of seniority, insurance participation, or other benefits, and such persons shall not be discharged from such positions without cause within 1 year after such restoration." (86 Cong. Rec. 9836). Senator Thomas, another member of the Senate Military Affairs Committee, referred

to Section 8 as an attempt "* * * to make secure [the veterans'] seniority, and to make secure all of the relations they had gained as a result of working." (86 Cong. Rec. 10572). Representative Celler considered Section 8 as a direction to private employers to restore the returning veteran "to [his original] position or to a position of like seniority, status, and pay * * *," and that under these provisions, "All those who serve shall have the right to claim return to their jobs." 86 Cong. Rec. 11435. Representative Healey stated that "You have held out to these men you are going to induct into service that you will restore them insofar as you have the power to restore them to their status quo before they were inducted into the service" (86 Cong. Rec. 11703). Congressional contemplation of a "status quo" restoration is still further expressed in a colloquy on the Senate floor: "Mr. Danaher: * * * is it meant * * * that if a man goes out to serve his country under this conscription plan and comes back he assumes his prior status * * * ? * * * Mr. Sheppard: "That is what this bill intends, as I understand. That is what the members of the committee thought should be and could be done." (86 Cong. Rec. 10107.)[3]

Also significant in connection with this absolute guarantee of pre-service seniority is the 1946 amendment of the Act continuing Section 8

[3] See also statement of William L. Green, President, AFL, at 86 Cong. Rec. 10091-2.

indefinitely. (60 Stat. 341, 342). The amendment was intended to make the section "permanent law" (Statement of Managers on the part of the House of Representatives, 92 Cong. Rec. 7472) and "perpetual" (Statement of the Chairman of the House Military Affairs Committee, 92 Cong. Rec. 3588). The Chairman stated: "Section 8 of the act is the one that guarantees a man priority or seniority rights to a job, or to his old job when he returns from the service and we have maintained that provision and made it perpetual so long as the act is in effect."[19]

B. *The Terms of the Act*

Section 8 employs precise language to achieve the legislative purpose of a full year's reemployment whenever recognition of the veteran's pre-service seniority entitles him to such steady work.

The Act is unambiguous: Section 8(b) requires that the veteran be "restore[d]" to his pre-serv-

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[19] Further congressional concern for full protection of veterans' reemployment rights under Section 8 of the 1940 Act is apparent from Report No. 1268 of the Senate Committee on Armed Services, stating, with respect to the comparable reemployment section of the "Selective Service Act of 1948" (Public Law 759, 80th Cong., 2d sess.):

> "* * * as a matter of policy, no reemployment rights should be granted to personnel serving under this legislation [*i.e.*, the 1948 Act] which would contravene, or take precedence over reemployment rights now enjoyed by men who already have been in the services, and who are receiving benefits under the 1940 Act."

ice position "or to a position of like seniority, status, and pay." Use of the terms "restore" and "like seniority" clearly envisages a return to at least the seniority he had when entering the service. This directive to give the returning veteran his "status quo" seniority is repeated in Section 8(*c*). That section, specifically reiterates the congressional mandate[11] that the veteran "shall be so restored without loss of seniority * * * and shall not be discharged from such position without cause within one year after such restoration." By so defining the incidents of restoration, that section shows again how intent Congress was upon preserving the serviceman's seniority rights. Congress unquestionably was aware that a large percentage of inductees were employees of industries whose labor relations were controlled by collective bargaining agreements, that these agreements were changed from time to time including the seniority provisions thereof, and that veterans' seniority rights under the Act might well be affected by changes in the seniority provisions of such collective bargaining agreements. Certainly, in setting forth the incidents of restoration, Congress, if it had intended the result here

[11] In *Hilton* v. *Sullivan*, 334 U. S. 323, 329, which involved the job retention rights of a veteran in his federal civil service position, this Court said: "We have examined the legislative history of the Selective Training and Service Act of 1940 and find nothing whatever which faintly suggests that Congress intended its language to be less mandatory than implied by the words it used."

urged by petitioner, would not have required restoration "without loss of seniority" but would have required restoration to such seniority as would be available to the returning veteran under the collective bargaining agreement in effect at the time of his reemployment.[12]

C. The Rulings of this Court in the Veterans Reemployment cases

Petitioner, in arguing for super-seniority for union chairmen over veterans with longer service in the plant, relies primarily on language in *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, and *Trailmobile Co.* v. *Whirls*, 331 U. S. 40. But analysis of those two cases demonstrates rather that they stand for the proposition that Section 8 fully protects a returning serviceman's pre-induction seniority during the first year of his reemployment.

1. *The Fishgold and Trailmobile cases hold that Section 8 guarantees to a veteran his full pre-service seniority rank during, but not after, his first reemployment year.* In the *Fishgold* case, unlike here, the veteran was restored to his pre-service position with his full pre-service seniority. And,

[12] Other language in Section 8(c) supports the conclusion that the Act was intended to preserve to the veteran, at the least, all rights which he had at the time of his induction. Section 8(c) provides that the rules and practice "in effect with the employer at the time such person was inducted into such forces" shall determine the extent of the "insurance or other benefits" to which a returning veteran is entitled.

unlike here, no contention was there made that a collective bargaining agreement, entered into while he was in service, had attempted to reduce his pre-service seniority rank. At all times, in the *Fishgold* case, it was clear that the seniority rank to which the veteran had been actually restored upon reemployment was at least equal to the rank he held at the time of his induction. The record in the *Fishgold* case shows that the seniority provisions in the 1944 collective bargaining agreement, which required layoffs to be based on length of service, and pursuant to which Fishgold was laid off, were substantially identical to the seniority provisions embodied in the collective bargaining agreement which was in effect at the time of Fishgold's induction into the armed forces in 1943 (see Brief for Petitioner, p. 4, note 1, in the *Fishgold* case, No. 970, October Term, 1945). In fact, this Court, in the *Fishgold* case, invoked the Selective Training and Service Act of 1940, not only to secure to the veteran his full pre-service seniority, but to guarantee that his "service in the armed services is counted as service in the plant" so that he is not deprived of the benefits of the seniority he would have accumulated during the war. Since the normal operation of the seniority system in effect in Fishgold's plant prior to his induction authorized layoff on a length of plant service basis, this Court refused to sanction a departure from that system on behalf of a veteran. It accordingly re-

jected Fishgold's contention that in addition to his right to restoration "without loss of seniority," he was entitled to a full year's employment *despite* his relative seniority standing. The Court ruled that where a veteran's pre-service (plus wartime accumulated) seniority does not entitle him to steady work during his first year of reemployment, the Act does not compel the employer to furnish him with such steady work. As a necessary corollary to this ruling, it is obvious that where, as here, the veteran's pre-service seniority does entitle him to such work, the Act requires that his pre-service seniority be fully recognized, and that he be given such work for at least the statutorily-prescribed one year period.

The *Trailmobile* case similarly compels the rejection of petitioner's claim that Section 8 furnishes no protection to pre-service seniority standing even during the veteran's first year of reemployment. The veteran, in that case, returned to his former position. Like Fishgold, but unlike the veterans in the instant case, he was restored "without loss of seniority." More than a year after his reemployment a new collective bargaining agreement cut down the pre-service seniority rank to which he had been restored at the time of his return. In holding that the Selective Training and Service Act of 1940 does not protect a veteran's pre-service seniority from being impaired by a collective bargaining agreement after the expiration of his first year of reemployment,

this Court stated that the veteran is entitled to such protection during that first year (331 U. S. 40, 58-59):

> For the statutory year indeed this meant that the restored rights could not be altered adversely by the usual processes of collective bargaining or of the employer's administration of general business policy.

And, in referring to the "other rights" conferred by Section 8(b) and (c), which were specifically defined as "including restored statutory seniority," [13] this Court stated (331 U. S. 40, 55-56):

> There can be no doubt whatever that Congress intended by Section 8(c) to secure the "other rights" guaranteed by it for at least the minimum term of the prescribed one-year period. This indeed was a specific ruling of the *Fishgold* case.

2. *The Fishgold and Trailmobile cases also hold that reduction of a veteran's pre-service seniority rank, during his first reemployment year, violates Section 8 (c)'s prohibition against discharge.* The guarantee against discharge, contained in the last clause of Section 8 (c) of the Act, was held, in the *Fishgold* case, to be "broad enough to cover demotions. * * * If within the statutory period [the veteran] is demoted * * * [he] would within the meaning of Section 8 (c) be discharged" (328 U. S. 275, 286).

[13] See 331 U. S. 40, 53.

It is clear from the *Trailmobile* case that the failure, during the reemployment year, to restore a veteran to at least the same seniority status that he had when he left for the service constitutes such a "demotion" and therefore a "discharge" prohibited by Section 8 (c). In the *Trailmobile* case, this Court, analyzing the *Fishgold* holding, restated the proposition (331 U. S. 40, 56-57):

> [The *Fishgold* case] squarely held that [the veteran] was given security not only against complete discharge, but also against demotion, for the statutory year. And demotion was held to mean impairment of "other rights," including his restored statutory seniority for that year. "If within the statutory period he is demoted, his status, which the Act was designed to protect, has been affected and the old employment relationship has been changed. He would then lose his old position and acquire an inferior one. He would, within the meaning of Section 8 (c) be discharged from such position." 328 U. S. at 286.
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> That Section 8 (c) applies to secure the protection of "other rights" for at least the statutory year was therefore inherent in the rationalization of the *Fishgold* decision. * * * While the reemployed veteran did not acquire superseniority, Section 8 (c) gave him the restored standing for the minimum duration of the prescribed year.

The language quoted and the actual decision in

the *Fishgold* case makes two things clear: (1) Fishgold's layoff did not constitute a "discharge" prohibited by Section 8 (c) because even though it occurred within the statutory year, it was "temporary" [14] and not in any way the result of any demotion or reduction in seniority rank held by the veteran prior to his induction; and (2) where a veteran's pre-service seniority has been reduced during his first year of reemployment, the "demotion" to the "inferior position" resulting from such reduction, constitutes a "discharge" in violation of Section 8 (c). The precise language of this Court on this second point is made even stronger by a footnote explanation in the *Trailmobile* case (331 U. S. 40, 53, fn. 23):

> The position to which an employee must be restored is either the position previously held or "a position of like seniority, status, and pay." See note 18. It is thus recognized that *part of the restored "position" is the seniority accrued prior to service in the armed forces* and, under the *Fishgold* case, during service. "Seniority" is part of "position," and therefore when the Act states in subsection (c) that the veteran may not be discharged "from such position" it means both from the job itself and from the seniority which is part of the job. [Emphasis supplied.]

These statements leave no room for doubt that a reduction in pre-service seniority, effected during

[14] See *Hilton v. Sullivan*, 334 U. S. 323, 332.

the veteran's first year of reemployment, violates the "discharge" prohibition of Section 8 (c). And, at the same time, they shed light on other language of the *Fishgold* opinion on which petitioner relies, in which this Court stated that the Act undertook "to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year." (328 U. S. 275, 288). For, while *Fishgold* held that veterans had to suffer the consequences of the normal operation of the seniority system in effect at the time of their induction, that case, as was said in the *Trailmobile* case, also held that the Act assured the veterans that, at least for the statutory reemployment year, their pre-service seniority rank would not be impaired. Such impairment was condemned by this Court as a "demotion" or "discharge" in violation of the Act, even though no termination of the employment relationship or actual loss of work resulted (331 U. S. at 57). Certainly, where, as here, the 1945 agreement not only caused a "demotion" in the veteran's pre-service seniority status, in the sense of placing their names in a lower position on the seniority roster, but also denied them the pay they would otherwise have earned during the period of the lay-off, there is even greater reason for invoking the protection of the Act.

II

The Veteran's Pre-service Seniority May Not Be Impaired by Later Collective Bargaining Agreement Until He Has Had One Year of Reemployment

A. Although a Veteran's Pre-service Seniority Is Derived from Contract, It is Protected by Section 8 During the First Year of Reemployment, and Thus May Not Be Impaired by a Later Collective Bargaining Agreement.

Petitioner contends that employment does not carry with it any inherent right to seniority, but that the seniority rights of the veterans here involved exist only by virtue of the collective bargaining agreements between it and respondent Lockheed. Apart from this agreement, it is argued, there would be no right of seniority in respondent veterans. Based on that premise, the argument evidently is that since the present collective bargaining contract confers super-seniority on union chairmen, the seniority rights derived from that contract by all other employees, including veterans during their first year of reemployment, are subject to the absolute priority it confers on union chairmen. While conceding that seniority rights in this as in most other situations result from collective bargaining agreements, the short answer to this argument is that absent any contractual seniority system, the veteran's right to a full year's reemployment is absolute. Moreover, there can be no doubt that the Act clearly requires that the

veteran be restored to "the seniority accrued prior to his service in the armed forces," *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 53, fn. 23. And this restoration to pre-service seniority is required by the Act regardless of any unfavorable change in seniority rules during the employees' military service, since a failure to restore a veteran to his preservice seniority constitutes a discharge "within one year" in violation of Section 8 (c). *Id.*, p. 57. Any other conclusion would make Section 8's guarantee of restoration to reemployment with pre-service seniority dependent upon the acquiescence of the employer and the union.

Thus, while the Act does not create its own seniority system, it does give statutory protection to contract-derived seniority existing at the time the veteran joined the armed forces. So direct and complete is the statutory protection extended to veterans' seniority rights initially derived from contract that this Court, in the *Trailmobile* case, regularly referred to such seniority as being "statutory" in nature.[15] Since the seniority rights are "statutory," even though derived from a collective bargaining contract,[16] they are not, so far as

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[15] The sole question on the merits in the *Trailmobile* case was stated by this Court to be "whether under Section 8 the veteran's right to *statutory seniority* extends * * * beyond * * * the first year * * *": (331 U. S. 40, 51) (Emphasis supplied). For additional references by this Court to "statutory seniority" under the Act see, *id.* at 53 and 56.

[16] See *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 53, fn. 21; *Polanskey* v. *Monongahela R. Co.*, 342 Pa. 188; *Ryan* v. *New York Central R. R.*, 267 Mich. 202, 208; *Casey* v. *Brotherhood*, 197 Minn. 189, 191-2.

the returning veteran's status for his first reemployment year is concerned, subject to impairment by a superseding bargaining agreement. "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 285. Contractual provisions in effect even prior to the veteran's induction into the service which, if literally construed, would deprive the returning veteran of this seniority conferred by the Act will not be recognized.[17] *Spearmon* v. *Thompson*, 167 F. 2d 626, 630 (C. A. 8), certiorari denied, 335 U. S. 822; *Rudisill* v. *Chesapeake & O. Ry. Co.*, 167 F. 2d 175, 179 (C. A. 4); *Anglin* v. *Chesapeake & O. Ry. Co.*, 77 F. Supp. 359 (S. D. W. Va.). Where as here, the later bargaining agreement is in conflict with the protective provisions of the statute, the agreement obviously must yield. *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 285; *Waskey* v. *Hammer*, 223 U. S. 85, 94; *Ewert* v.

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[17] Section 8 "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. See *Boone* v. *Lightner*, 319 U. S. 561, 575." *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 285. Accord: *Houghton* v. *Texas State Life Ins. Co.*, 166 F. 2d 848, 849 (C. A. 5), certiorari denied, 335 U. S. 822; *Levine* v. *Berman*, 161 F. 2d 386, 388 (C. A. 7), certiorari denied, 332 U. S. 792; *Grasso* v. *Crowhurst*, 154 F. 2d 208, 210-211 (C. A. 3), certiorari denied, 329 U. S. 714; *Bryan* v. *Griffin*, 166 F. 2d 748, 750 (C. A. 6); *Kay* v. *General Cable Corp.*, 144 F. 2d 653, 654 (C. A. 3); *Flynn* v. *Bendix Aviation Corp.*, 77 F. Supp. 452 (D. Mass.); *Noble* v. *International Nickel Co.*, 77 F. Supp. 352, 354 (S. D. W. Va.); *Morris* v. *Chesapeake & O. Ry. Co.*, 75 F. Supp. 429, 431 (N. D. Ind.).

Bluejacket, 259 U. S. 129, 138; *Miller* v. *Ammon*, 145 U. S. 421; *Harris* v. *Runnels*, 12 How. 79, 84; cf. *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697.

B. *Section 8 Demands More Than Protection of the Veteran from Discrimination.*

1. *The purpose of Section 8 may not be narrowed merely to prohibit collective bargaining agreements which discriminate against the returning veteran because of his military service; even as against non-discriminatory agreements, the Act affirmatively protects the veteran's right to his pre-service seniority status during the first year of his reemployment.* Petitioner urges that the purpose of Section 8 is fulfilled whenever the returning veteran is not discriminated against by reason of his absence in military service. Therefore, it is argued, that since the impairment of seniority rights here involved was directed not against veterans alone but against all employees in the same plant (excluding union chairmen), there was absent the discrimination banned by the Act. In support of this argument, petitioner properly invokes the Third Circuit cases which are in conflict with the decision below: *Gauweiler* v. *Elastic Stop Nut Corp.*, 162 F. 2d 448; *Koury* v. *Elastic Stop Nut Corp.*, 162 F. 2d 544; *DiMaggio* v. *Elastic Stop Nut Corp.*, 162 F. 2d 546, and *Payne* v. *Wright Aeronautical Corp.*, 162 F. 2d 549. The latter four cases, all decided by the Court of Appeals for the Third Circuit on the same day, pro-

ceed on the assumption that a veteran's pre-service seniority rights may be impaired by a later collective bargaining agreement entered into while the veteran was on military furlough simply because such impairment was not limited to veterans but adversely affected non-veterans' seniority rights as well.[18]

The purpose of the Act extends beyond protection of veterans against discrimination. The lack of merit in the suggestion that the Act's reemployment provisions merely prohibit discriminatory practices against the veteran is evident from the text of the statute itself. In fact, in the *DiMaggio* case, the Court of Appeals for the Third Circuit recognizes that its conclusion, as well as that arrived at in the related *Gauweiler* case, conflicts with the "exact letter" of Section 8 (b) (*DiMaggio* v. *Elastic Stop Nut Corp.*, 162 F. 2d 546, 548, concurring opinions).

In many of its clauses the Act clearly extends to a reemployed veteran protection which would not have been his if he had always remained at work. (1) He is protected against discharge without cause

[18] Until the *Fishgold* case settled the question, there was some disagreement as to whether seniority rights continued to accumulate during the employee's military service or were frozen as of the time of induction. See Military-Service and War-Job Clauses in Union Agreements, 55 Monthly Labor Review 1147, 1150; Brecht, Collective Bargaining and Re-employment of Veterans, 227 Annals of the American Academy of Political and Social Science 94, 95. However, prior to the *Gauweiler* and related decisions there apparently existed no doubt that the veteran was entitled to return to the seniority which he enjoyed at the time of his induction.

for the statutory year after his reinstatement. No such guarantee is normally available to other employees, except, of course, where a contract has fixed the term of employment. (2) He is guaranteed against receiving a job inferior to his pre-service job, even though had he stayed at the plant, he could have been assigned to a job drawing less pay. (3) He participates in insurance and other benefits (*e.g.*, health, welfare, and retirement plans) pursuant to rules "in effect with the employer at the time such person was inducted into such forces" (Section 8 (c)), although the rules may have been revised during his military service so as to withdraw some or all of these benefits from employees then at work. (4) He is, as we have shown above, entitled to his full pre-service seniority standing, despite the fact that collective bargaining agreements entered into while he was in service cut down seniority rights of employees who never left the plant for war service. (5) And, if he is returning to the federal civil service he is entitled to remain on the job for a full year even though a reduction in force causes the furloughing of non-veterans having greater seniority. *Hilton* v. *Sullivan*, 334 U. S. 323; see, 5 Code Fed. Reg. (Supp. 1947), sec. 20.3(a).

There is no doubt that each of the enumerated protections operates to bar discrimination against the veteran as such; but it is equally clear that the Act chiefly concerns itself with the more affirma-

tive goal of enabling the discharged soldier to renew his commercial or industrial career in at least as good a position as he had when he left to enter the armed forces. *John S. Doane Co.* v. *Martin*, 164 F. 2d 537, 540 (C. A. 1): Protection against discrimination, while important, is not enough. The returning veteran is to have the fixed and accustomed starting point of his old job from which to begin his economic readjustment in civilian life.[19] Part of that old job, this Court has pointed out, "is the seniority accrued prior to service in the armed forces" (*Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 53, fn. 23).

If the legislative intention had been merely to safeguard the veteran from being penalized because of his military service, Section 8 would not have been drafted along the lines of an affirmative specification of the rights secured by it. It would and could have been cast, as is the National Labor Relations Act, in the familiar terms of a general prohibition against such discrimination. In fact, early in the legislative history of the reemployment provisions here involved, it was proposed to make the failure of the employer to reemploy the veteran "an unfair labor practice, within the meaning of and for all the purposes of the National Labor Relations Act"; S. Rep. No. 2002, 76th Cong., 3d sess., p. 4; 86 Cong. Rec. 10107; S. Rep. No. 1987, 76th Cong., 3d sess., p. 2; 86 Cong. Rec. 10068. The

[19] See *supra*, p. 13.

House of Representatives, however, struck out the reference to the unfair labor practice, and its amendment was accepted in conference and embodied in the final legislation. Consequently, reading the statute, as do petitioners and as did the court in the *Gauweiler* and related cases, to embody only a rule against discrimination, not only ignores the statute's essential purpose and its express terms, but writes into it provisions which Congress deliberately rejected.

The *Fishgold* and *Trailmobile* cases support no other conclusion. In the *Fishgold* case, this Court prefaced its enumeration of the specific statutory guarantees contained in Section 8 with the statement that: "The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. *He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.*" (Italics supplied) 328 U. S. 275, 284. Again in the *Trailmobile* case, these additional advantages available under the Act only to the returning veteran were described as giving him "extraordinary statutory security" (331 U. S. 40, 59). Thus the Court has fully recognized the Act's intent to serve a dual purpose—to bar discrimination against the veteran, and to give him a definite measure of economic security not available to non-veterans. At the same time, these

statements emphasize the basic fallacy in the limited-to-discrimination-purpose approach urged by petitioner here and espoused by the Court of Appeals for the Third Circuit in the *Gauweiler* and related cases.

It is no answer, therefore, to urge that the veteran respondents are in no worse a position than they would have been if they had never gone to war. Since they did go, they are in a different position, and entitled to the protection not accorded by the Act to those who not only did not assume the burden of their country's defense but received high wartime pay as well.[20]

2. *The decision below does not impair effective labor relations.* Throughout the *Gauweiler* and related opinions there seems to be expressed the fear that failure to enforce the union chairmen super-seniority provision against veterans with greater seniority, may somehow disrupt harmonious labor-management relations. In view of the direct conflict between those cases and the decision of the court below, a short discussion of the fears raised by the Third Circuit is in order.

The initial difficulty envisaged by the Third Circuit is a "merry-go-round" infinitely destructive to industrial peace (*DiMaggio* v. *Elastic Stop Nut Corp.*, 162 F. 2d 546, 548, concurring opinion).

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[20] *Grubbs* v. *Ingalls Iron Works Co.*, 66 F. Supp. 550, 553-554 (N. D. Ala.); see Seniority and Reemployment of War Veterans (National Industrial Conference Board Studies in Personnel Policy, No. 65 (1944), pp. 2-3, 7.).

For, that court states, a senior veteran displacing a junior union chairman will in turn be displaced, under the *Fishgold* case, by a non-veteran having greater seniority than the veteran. The non-veteran in turn will then be displaced by the union chairman, who, although having less seniority, is entitled to absolute seniority under the union agreement. Then, the court points out, "this process must be repeated *ad infinitum*." (162 F. 2d 546, 548.) The court there terminated the cycle by giving controlling effect to the collective bargaining agreement rather than to the federal statute, a solution which, we submit, the court below properly rejected. Examination of the *Fishgold* case, moreover, makes it apparent that the "merry-go-round" suggested by the Third Circuit will not result. In the *Fishgold* case there was no doubt that the veteran had been restored to his full pre-service seniority as required by Section 8. (See *supra*, p. 27). This Court there held that after such restoration had been effected, Section 8 of the 1940 Act did not compel the employer to give the veteran super-seniority over a non-veteran, who had more years of plant service. However, Section 8, which protects only the rights of a veteran, cannot be invoked to compel an employer to discharge a veteran in favor of a non-veteran employee with greater seniority. See *Lindsey* v. *Leewright*, 17 U. S. Law Week 2311 (C. A. 5). Accordingly, if the non-veteran employees choose to make a collective

bargaining agreement giving super-seniority to union officers, they have no complaint if Section 8 limits the application of such super-seniority to the non-veteran employees. Specifically, the seniority rights of a non-veteran may be modified by the subsequent agreement while those of the veteran may not, at least during his first year of reemployment. Thus, if there are only two jobs and three employees —a non-veteran, a veteran and a non-veteran union chairman with normal seniority in that order, the jobs must go to the veteran and the union chairman. Accordingly, since the *Fishgold* case does not require displacement of the veteran by the senior non-veteran, the second phase of the "merry-go-round" is not even reached.

The need for continuation in the office of union chairmen in order to avoid interference with collective bargaining and to enable union members "to have their own representatives on the job to look after their interests," [21] is also advanced as justification for the Third Circuit Court's conclusions (*Gauweiler* v. *Elastic Stop Nut Corp.*, 162 F. 2d 444, 451; *DiMaggio* v. *Elastic Stop Nut Corp.*, 162 F. 2d 546, 547). The theory is that effective collective bargaining is facilitated by continuation in employment of union chairmen who have acquired skills in resolving the day-to-day disputes between an employee and the manage-

[21] Cf. Harbison, *Seniority Policies and Procedures as Developed through Collective Bargaining* (Princeton University, Industrial Relations Section, Research Report No. 63, 1941), p. 11.

ment. However, accepting this theory as valid,[22] it would seem that the unions, by specific provision to that effect in their contracts, could provide that whereas a union chairman does not have absolute seniority over a senior veteran during the latter's first year of reemployment, he does have absolute seniority at all times over all non-veterans regardless of their length of service.[23] Under such a provision, in the event of a reduction in force, both the veteran and the union chairman would remain at work while the other non-veteran would be furloughed. The suggested provision would thus allow the union chairman to continue in office without impairing the rights of the veteran under Section 8, and would have the further virtue of not seeking to overrule the mandate of Section 8 of the Act by a collective bargaining agreement.

The virtues or vices of the "top seniority" system for union officials, then, are not here in

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[22] It should be noted that the 1945 agreement itself allows a union chairman to hold office for only one year, after which time new elections for the chairmanship must be held (Art. II, Sec. 2, R. 49).

[23] Some unions already use provisions which avoid deprivation of a veteran's pre-service seniority and thereby assure him of steady work during the first reemployment year. See, *e.g.*, the clauses giving shop stewards "top priority provided there is no conflict with the Selective Service Law." Collective Bargaining Contracts and Negotiations, (Bureau of National Affairs, p. 51:205). See also reference to Seniority and Reemployment of War Veterans (National Industrial Conference Board Studies in Personnel Policy, No. 65 (1944), p. 9.).

issue. As the suggested solution indicates, management and labor can make such a system fully operative except where it would whittle away the guarantees of Section 8 to the returning veteran during his first reemployment year. And such a "top seniority" clause may be made effective even as against the veteran during that first year wherever the clause existed as a condition of the veteran's employment at the time of his induction. In the latter situation, the veteran would have no just cause for complaint since the condition insisted upon by the employer and the union at the time of his return would be the same as that to which he was subject when he left for military duty. *Kemp* v. *John Chatillon & Sons,* 169 F. 2d 203, 205, 206 (C.A. 3); *Boston & Maine R. R.* v. *David,* 167 F. 2d 722, 725 (C. A. 1); *Lesher* v. *P. R. Mallory & Co.,* 166 F. 2d 983, 985 (C. A. 7); *Harvey* v. *Braniff International Airways,* 164 F. 2d 521, 522 (C. A. 5); *Feore* v. *North Shore Bus Co.,* 161 F. 2d 552, 554 (C. A. 2); *Harrison* v. *Seaboard Air Line R. Co.,* 77 F. Supp. 511 (E. D. S. Car.). Where, however, the condition was not present at the time of his induction, but was imposed during military furlough, it may not, we submit, be invoked against the returning veteran during his first reemployment year.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General,
H. G. MORISON,
Assistant Attorney General,
PAUL A. SWEENEY,
MORTON HOLLANDER,
Attorneys.

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APPENDIX

The Selective Training and Service Act of 1940 as amended, 54 Stat. 885, 58 Stat. 798, 50 U. S. C. App. 308, provides in pertinent part:

Sec. 8. (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore

such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered

by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits.

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